Supreme Court, U.S.
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No. 14-452

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SIDNEY J. GLEASON,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

This case involves an important and unresolved federal constitutional issue–whether the Eighth Amendment requires that a jury in a death penalty case be affirmatively instructed that mitigating circumstances need not be proven beyond a reasonable doubt. The lower courts are split on this question, and resolution of the question here affects two-thirds of the death sentences currently imposed in Kansas.

Respondent Gleason nonetheless argues that this Court should deny review, because he contends the decision below was really only a state law decision, in spite of what the Kansas Supreme Court said about resting its holding on the Eighth Amendment. Respondent then proceeds to argue wishfully that there could be an independent and adequate state law ground for the decision and thus no real split of authority on any federal question. Brief in Opposition (Opp.) 1 10. Respondent Gleason is flatly wrong (just like Respondent Reginald Carr who made the identical arguments in *Kansas v. Carr*, No. 14 – 450). The Kansas Supreme Court unquestionably relied on Eighth Amendment grounds, and added to a split of authority on the federal question.

The Court should grant review of the question presented in the State's petition.

I. The Kansas Supreme Court's Decision Explicitly Rested on Eighth Amendment Grounds.

Respondent incorrectly argues that the Kansas Supreme Court's decision rested on state law grounds. Opp. 2 - 3. This attempted misreading of the decision

below is plainly refuted by the Kansas Supreme Court's opinion, which states as follows in the "Conclusion":

> The district court's instruction on mitigating circumstances failed to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt. And the penalty-phase instructions as a whole exacerbated the error because they referred only to the beyond-a-reasonable-doubt burden of proof. Under these circumstances, we conclude a reasonable likelihood exists that the jury applied the mitigating circumstances instruction in a manner precluding individual jurors from properly considering relevant mitigating evidence *as required by the Eighth Amendment*. Consequently, we vacate Gleason's death sentence and remand for resentencing.

State v. Gleason, 329 P.3d 1102, 1148 (2014) (emphasis added) (Pet. App. 103).

Prior to reaching this conclusion, the court held:

> Notably, *Kleypas*' first statement-that any mitigating circumstance instruction must inform the jury that mitigating instructions "need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt," both preserves the statute's favorable distinction and protects a capital defendant's *Eighth Amendment right* to individualized sentencing by ensuring jurors are not precluded from considering all relevant mitigating evidence. [Citation omitted.]

Id. at 1147 (emphasis added) (Pet. App. 101).

Furthermore, the dissenting Kansas Supreme Court Justices did not share respondent's wishful thinking: "I dissent from the majority's holding that Sidney Gleason's sentence was imposed *in violation of the Eighth Amendment* ...." Pet. App. 120 (emphasis added). *See id.* at 120 124 (referring to the Eighth Amendment and the majority's Eighth Amendment analysis no less than sixteen times).

In *Kansas v. Reginald Carr*, (cert. petition pending, No. 14 – 450) decided one week after this case, the Kansas Supreme Court reiterated that its position with respect to the burden of proof instructions on mitigation relied on a purported Eighth Amendment violation:

> In Kansas, a district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt. See *State v. Gleason*, No. 97,296, 299 Kan. ——, —— – ——, 329 P.3d 1102 (filed July 18, 2014) (slip op. at 82–86) (discussing *Scott*, 286 Kan. at 106–07, 183 P.3d 801; *Kleypas*, 272 Kan. at 1078, 40 P.3d 139); see also K.S.A. 21–4624 (State expressly burdened with proving existence of aggravating circumstance beyond reasonable doubt; statute silent on standard of proof on mitigating circumstance). When nothing in the instructions mentions any burden other than "beyond a reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response to" mitigating evidence,

> implicating a defendant's right to individualized sentencing *under the Eighth Amendment*. *Gleason*, 299 Kan. at ——, 329 P.3d 1102 (slip op. at 85) (citing *Scott*, 286 Kan. at 107, 183 P.3d 801). This is unacceptable.

State v. Carr, 331 P.3d 544, 732-33 (2014) (emphasis added). There is *no* support for the contention that the decision below rested on any ground other than the Eighth Amendment.

Contrary to respondent's misguided contention that there are independent and adequate state grounds to sustain the Kansas Supreme Court's decision, Opp. 4 - 7, the lower court's decision rests *solely and exclusively* on *federal* constitutional grounds. At best, respondent can wishfully assert that the Kansas Supreme Court might have been able to rely on *potential* state grounds. But the fact that state law arguments *could potentially be made, if* this Court reverses on the federal constitutional issue and remands the case, does not demonstrate in any way that the decision the State is asking this Court to review rests on an independent and adequate state law ground. *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). No such claim is even remotely plausible. See *Florida v. Meyers*, 466 U.S. 380, 381 n.a1 (1984).

II. Review On The Merits Is Warranted, Both Because The Decision Below Creates A Split Of Authority And Because The Decision Will Have A Severe Impact On Existing Kansas Death Sentences.

A number of states, including California, Delaware, Indiana, Louisiana, and Texas, have affirmatively held that the Eighth Amendment does not require that a jury be instructed that mitigating circumstances need not be proven beyond a reasonable doubt, expressly rejecting the reasoning the Kansas Supreme Court adopted. Thus, the Kansas Supreme Court's decision on Eighth Amendment grounds here necessarily conflicts with the holdings of these courts, as explained in the State's petition for writ of certiorari. To avoid this unnecessary contribution to a "crazy quilt" of federal death penalty jurisprudence, review is warranted. *See Kansas v. Marsh,* 548 U.S. 163, 185 (2006) (Scalia, J., concurring) ("Turning a blind eye to federal constitutional error ..., allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt.")

Respondent also invites this Court to decline review because the issue allegedly is not likely to arise in future Kansas capital prosecutions. Opp. 10. This argument ignores, however, that if the decision below stands, it will invalidate the death sentences of six of the nine defendants currently on death row in Kansas.

CONCLUSION

For the reasons set forth in both Kansas's petition for a writ of certiorari and this reply, Kansas requests that the Court grant review of the question presented.

Respectfully submitted,

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